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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 DC3 ENTERTAINMENT, LLC, a Washington
11 limited liability company,

12 Plaintiff and Counterclaim Defendant,

13 v.

14 JOHN GALT ENTERTAINMENT, INC., a
15 California corporation; DAVID
16 KERSHENBAUM and TIMMI DEROSA
17 KERSHENBAUM, husband and wife and the
18 marital community composed thereof,

19 Defendants and Counterclaim Plaintiffs.

20 CASE NO. C04-2374C

21 ORDER

22 JOHN GALT ENTERTAINMENT, INC., a
23 California corporation; DAVID
24 KERSHENBAUM and TIMMI DEROSA
25 KERSHENBAUM, husband and wife and the
marital community composed thereof,

26 Third-Party Plaintiffs,

27 v.

28 JONATHAN PHELPS and ESTHER PHELPS,
29 husband and wife and the marital community
30 composed thereof,

31 Third-Party Defendants.

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1 This matter comes before the Court on Defendants' Motion to Compel Production of Documents
2 (Dkt. No. 96) ("Defs.' Mot."), Plaintiff's and Third-Party Defendants' Opposition (Dkt. No. 109) ("Pl.'s
3 Opp'n"), and Defendants' Reply in support of their motion (Dkt. No. 121) ("Defs.' Reply"). The Court
4 has considered the papers submitted regarding this motion and determined that oral argument is not
5 necessary. The Court hereby GRANTS the motion and rules as follows.

6 **I. BACKGROUND**

7 The underlying dispute concerns a series of agreements related to the development of a debut
8 album by recording artist Brian Judah, as well as the business relationship between the parties. Plaintiff's
9 First Amended and Supplemental Complaint (Dkt. No. 14) alleged claims for declaratory judgment,
10 breach of contract, breach of a covenant of good faith and fair dealing, breach of fiduciary duty, and
11 injunctive relief in connection with Plaintiff's relationship with Defendants, particularly David
12 Kershenbaum and Timmi DeRosa Kershenbaum. Defendants counterclaimed for breach of contract, an
13 accounting of royalties, establishment of a constructive trust, discrimination, harassment, retaliation, and
14 wrongful termination; they also claimed against Third-Party Defendants for an accounting of royalties,
15 establishment of a constructive trust, harassment, and retaliation. (Dkt. No. 18.)

16 Specifically relevant to the instant motion is Defendants' first set of Requests for Production of
17 Documents, propounded to Plaintiff and Third-Party Defendants on April 15, 2005. Responses to these
18 requests were served on May 18, 2005. The instant motion seeks production of documents and things set
19 forth in Requests 4 and 9.

20 The parties have satisfied the meet-and-confer requirement of Federal Rule of Civil Procedure
21 37(a)(2) through their correspondence documented in their papers on this motion (*see, e.g.*, Defs.' Mot.
22 6-7) and according to Defendants' certification in support of their motion (Dkt. No. 98).

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1 **II. ANALYSIS**

2 Federal Rule of Civil Procedure 26(b)(1) provides:

3 Parties may obtain discovery regarding any matter, not privileged, that is relevant to the
4 claim or defense of any party For good cause, the court may order discovery of any
5 matter relevant to the subject matter involved in the action. Relevant information need not
6 be admissible at the trial if the discovery appears reasonably calculated to lead to the
7 discovery of admissible evidence.

8 FED. R. Civ. P. 26(b)(1). In order to reduce the element of surprise and facilitate settlement, courts
9 liberally construe pretrial discovery. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984). Thus, the
10 information Defendants seek must be relevant and non-privileged if that information is to be discoverable.

11 **A. Request No. 4**

12 Request No. 4 seeks production of the “‘black books’ or diaries containing the daily or periodic
13 handwritten entries or notes of [Third-Party Defendant] Jon Phelps for the period January 1, 2003 to the
14 present.” (Defs.’ Mot., Stone Decl. Ex.1.) Plaintiff’s and Third-Party Defendants’ Response to this
15 Request for Production was as follows:

16 Plaintiff and the Phelpses object to Request for Production No. 4 on the grounds that it
17 seeks irrelevant information, is not reasonably calculated to lead to the discovery of
18 admissible evidence, is overly broad and unduly burdensome, in so far as it seeks all diaries
19 from January 1, 2003 to the present regardless of relevance and despite the fact that the
20 parties did not meet until June 2003. Plaintiff and the Phelpses further object to the
21 request on the grounds that it is highly invasive of privacy rights and is intended to harass
22 Jonathan Phelps. Without waiving the foregoing objections, Plaintiff and the Phelpses will
23 produce non-privileged, redacted copies of the diaries during the relevant time period
24 upon entry of a stipulated protective order.

25 (*Id.*) Following the request and response, 1189 pages¹ of the journal were produced in a series of
26 separate productions. According to Defendants, almost three-fourths of the information in the journals
27 has been redacted. (Defs.’ Mot. 4.) No redacted information has been produced since. (*Id.* at 6.)

28 ¹ This is the figure Defendants give. Plaintiff and Third-Party Defendants say they have produced
29 1091 photocopies. (Pl.’s Opp’n 4.) According to Plaintiff and Third-Party Defendants, these copies
30 came from 20 different books. (*Id.*)

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1 Defendants argue in their motion that the requested information must be produced because it is
2 critical to their case. In particular, the books contain the personal writing of Third-Party Defendant Jon
3 Phelps (“Mr. Phelps”) relevant to the operation of Plaintiff DC-3. According to Defendant Timmi
4 DeRosa Kershenbaum, Mr. Phelps read from the books to employees on a regular basis. (Defs.’ Mot.,
5 Kershenbaum Decl.) Some of these readings allegedly contained significant statements about her (as well
6 as about Defendant David Kershenbaum). (*Id.*)

7 As to relevance and privacy, Plaintiff and Third-Party Defendants claimed in a letter on August
8 25, 2005 that they had decided to produce the requested documents in part, rather than withhold them
9 altogether, and claimed to have redacted “personal and irrelevant” information. (Pl.’s Opp’n, Lay Decl.
10 Ex. 9.) Further, Plaintiff and Third-Party Defendants argue in their opposition that, rather than the
11 content Defendants allege, the redacted portions of the books merely contain information about “Mr.
12 Phelps’s other business, his family, his spirituality, his songwriting and other creative activities, and any of
13 a number of other things that have nothing to do with DC3 and/or Defendants David or Timmi
14 Kershenbaum.” (Pl.’s Opp’n 6.) Plaintiff and Third-Party Defendants maintain that they should be
15 required to produce no more, and, in the alternative, they request an *in camera* review by this Court
16 before any further portions of the books are ordered produced.

17 Defendants contend that, rather than protecting privacy, the redactions may improperly conceal
18 material evidence. As support for this theory, Defendants cite: (1) Defendant Timmi Kershenbaum’s
19 memory of Third-Party Defendant Jon Phelps reading from the books about his belief that she “had either
20 one demon or a legion of demons and that God had called upon Phelps to help Timmi”; (2) very few
21 entries in the 2- to 3-month period leading up to the end of Defendants’ employment with Plaintiff and
22 Third-Party Defendants; (3) the lack of references to Defendants’ work that Defendant Timmi
23 Kershenbaum remembers having heard read aloud; and (4) that, where the books did discuss Defendants,
24 there was the appearance that thoughts about Defendants continuing onto additional pages were redacted
25 in some places. (Defs.’ Mot. at 5–6).

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1 Defendants have not provided further evidence or examples of the above. However, as Plaintiff
2 and Third-Party Defendants admit, production of the books in full would be the “only possible support
3 for Defendants’ assertion regarding the frequency of their mention in the books.” (Pl.’s Opp’n 5–6.)
4 Because Defendants have *not* received production of the books in full, they should not be prejudiced for
5 not having the best possible evidence—or indeed the “only possible” evidence to support their motion.

6 The Court finds Plaintiff’s and Third-Party Defendants’ privacy and relevance objections
7 unconvincing. First, Mr. Phelps himself states the following: “I do not consider my books to be diaries or
8 calendars, nor do I consider them to be records of my life in which I record actions or conversations on a
9 daily basis. I simply use the books to periodically jot down my thoughts or information that I may want
10 to refer to at a later date.” (Pl.’s Opp’n, Phelps Decl. 2.) Further, Mr. Phelps stated that the books
11 represent “to do” lists and notes that “likely would make little sense to anyone but myself.” (*Id.* at 2–3.)
12 Yet the opposition to this motion argues that the redacted portions of the books contain personal
13 thoughts akin to the contents of a diary. Mr. Phelps’s contradictory statements about the content (the
14 books are not “diaries,” yet they are “personal” and referred to as “journals” in his Declaration) are
15 unpersuasive when considered as a whole. These statements signal to the Court that Mr. Phelps may
16 want to have it both ways—such that the books would be too personal to be discoverable, yet not
17 sufficiently demonstrative of his personal thoughts to be relevant to this lawsuit, which involves
18 significant contract, employment, and discrimination claims stemming from the parties’ business
19 relationship—claims wherein Mr. Phelps’s state of mind *is* relevant.

20 Furthermore, regardless of their personal content, the books clearly *are* business related. Indeed,
21 the portions of the books provided to the Court (*Id.* Ex. 1–2) largely relate to business matters. Thus,
22 aside from the unconvincing claims that the books are merely a collection of irrelevant personal thoughts,
23 the Court has no reason to think that the rest of the books are of an entirely different character than the
24 portions produced to Defendants and attached to the opposition to this motion. Because of this
25 appearance and the alleged readings from the books that occurred in the presence of employees (which,
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1 notably, goes unrefuted in Mr. Phelps's Declaration), the books do appear to be relevant to this suit. Mr.
2 Phelps's *business* is the Plaintiff in this case. By bringing suit and by allegedly reading aloud from his
3 books at work, Mr. Phelps has put the content of his books in issue and waived any privacy claim he may
4 have. Thus, the Court is inclined to deem the books discoverable, because they appear to be highly
5 relevant to the case.

6 A few other objections were made in addition to those discussed *supra*. In the original response
7 to Request No. 4, Plaintiff and Third-Party Defendants claimed that the request was broad and unduly
8 burdensome. However, based on the foregoing relevance analysis and the labor-intensive redaction
9 process that has already been completed, this objection is without merit. It is far less burdensome to
10 produce the books in their entirety than to produce redacted portions.

11 Finally, Plaintiff and Third-Party Defendants find fault with Defendants' method of calculating
12 how much was redacted (73.25%) and claim that the Defendants are merely inventing content that they
13 think should be in the books at certain times. In sum, throughout their opposition Plaintiff and Third-
14 Party Defendants repeat in various forms the alleged evidentiary deficiencies of Defendants' motion and
15 claim that the redacted portions cannot possibly be relevant. While the Court may have benefitted from
16 presentation of more concrete evidence (the lack of which is almost entirely out of Defendants' control),
17 Defendants still have made a case that the requested information is relevant. Further, just because the
18 information on redacted pages may not be *about* Defendants by name or *about* DC-3 does not mean that
19 the pages are irrelevant. The critical finding by this Court is that the information in the books may *lead*
20 Defendants to the discovery of admissible evidence. *See* FED. R. CIV. P. 26(b)(1). There is no test that
21 mandates that each page must bear their names before it is capable of being relevant to their defense
22 and/or prosecution of their counterclaims and third-party claims. Defendants have shown that the
23 information is relevant. The Court finds that an *in camera* review is not necessary.

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26 ORDER - 7

Having determined that the books are relevant and that any privacy claims have been waived, the only remaining argument that could prevent the books from being discoverable is that regarding privilege. Defendants argue that the books were not written in anticipation of litigation or for attorneys, and thus are not entitled to attorney-client privileged status. Because the documents are relevant and non-privileged, Defendants argue, they must be produced.

As to attorney-client privilege, several events relate to the instant motion. Third-Party Defendant Jon Phelps first met with his attorneys at Hendricks & Lewis on October 27, 2004 to discuss the instant case. (Pl.'s Opp'n, Furman Decl. 3.) Most of the pages in the books from October 2004 were withheld as privileged. (Pl.'s Opp'n, Lewis Decl. Ex. 2; Furman Decl. 3). A small part of the information produced arguably was created during the attorney-client privileged period that began sometime in October 2004 but was produced anyway, subject to Defendants' agreement that they would not argue that the privilege was waived by that limited production. (Pl.'s Opp'n, Lay Decl. Ex. 9; Lewis Decl. Exs. 1 & 2.) In any event, all information in the books from October 27, 2004 forward was withheld as privileged. (Pl.'s Opp'n, Furman Decl. 3-4.) The Court finds that no books created prior to October 2004 carry an attorney-client privileged status. However, the books created from October 27, 2004 forward likely are privileged. Thus, all redactions of material created before October 2004 have no privilege protection, and those books must be produced *in full*. Material created during October 2004 appears to have been redacted in a manner consistent with attorney-client privilege attachment, so redactions of material from October 2004 forward may remain in place.

Having determined that all books from January 1, 2003 through September 30, 2004 are discoverable in full, the only remaining issue is the level of confidentiality that should attach to those books during this litigation. In response to the privacy concerns raised by Mr. Phelps, Defendants assert that any private information in need of protection *already* is adequately protected by the June 27, 2005 Stipulated Protective Order Regarding Confidential Information (Dkt. No. 80) signed by this Court and by necessary redactions to protect financial account numbers, social security numbers, the names of

1 minors, and birth dates. The Court agrees. Any pages produced pursuant to this Order shall be
 2 designated “Confidential” and shall not be used for purposes other than this litigation, in accordance with
 3 all of the terms of the Protective Order.

4 **B. Request No. 9**

5 Request No. 9 seeks production of “CD copies of all masters, mixes, rough mixes, and works in
 6 progress for all songs for the Brian Judah album produced without David Kershenbaum.” (Defs.’ Mot.,
 7 Stone Decl. Ex.1.) Plaintiff’s and Third-Party Defendants’ Response to this Request for Production was
 8 as follows:

9 Plaintiff and the Phelps object to Request for Production No. 9 on the grounds that it is
 10 overly broad and unduly burdensome. Without waiving the foregoing objections, Plaintiff
 11 and the Phelps will make CDs available for copying, at Defendants’ sole expense, upon
 12 entry of a stipulated protective order.

13 (Id.) No CDs were produced in response. In fact, Plaintiff and Third-Party Defendants assert that their
 14 “response was in error” in their opposition to this motion. (Pl.’s Opp’n 3.) Defendants point out that this
 15 is the first they have heard of this “error.” (Defs.’ Reply 2.)

16 Defendants argue that they need the material to defend against the claims against them, which
 17 allege that Defendant David Kershenbaum’s work was substandard and grounds for breach. Defendants
 18 claim the information is also necessary to compare David Kershenbaum’s work to the new work. (Defs.’
 19 Mot. 3–4.) Plaintiff and Third-Party Defendants oppose the request in part because the material is “not
 20 mixed” (but will be by mid-December 2005) and in part because the unreleased recordings are
 21 “extraordinarily confidential.” Further, they not-so-subtly suggest throughout their papers on the motion
 22 that if the recordings at issue were produced, Defendants would “accidentally” release the material in
 23 spite of the Protective Order in place in this litigation. (Pl.’s Opp’n 3, 9–11.) As an alternative to
 24 completely protecting the material from Defendants’ ears, Plaintiff and Third-Party Defendants suggest a
 25 scheme for review of the material in their own studio.

26 The Court finds that Defendants have shown that the information sought by Request No. 9 is
 27 relevant to their defense and must be produced. Even though the recordings are not yet “mixed,” Plaintiff
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1 and Third-Party Defendants suggest—by their very proposal to allow Defendants to listen to the
2 recordings in Plaintiff's and Third-Party Defendants' studio—that *all* the requested recordings can be
3 listened to currently, regardless of their “mix” status and regardless of whether they are “finished” or not.
4 The parties discussed a replication process in their numerous meet-and-confer letters, wherein it appears
5 that CDs can be burned in short order and copies of the material produced. The Court finds that
6 requiring Defendants to go to Plaintiff's and Third-Party Defendants' studio is unduly burdensome and
7 unnecessary. Therefore, copies shall be made for Defendants' examination in the studio of their choice
8 and on their own timeline. The Protective Order already in place will protect the copied material from
9 being released to outsiders. Therefore, all copies of the recordings at issue in Request No. 9 shall be
10 produced to Defendants and marked as “Confidential.” Defendants may not share the recordings with
11 anyone for purposes other than this litigation, and must follow all the terms of the Protective Order.
12 Further, Plaintiff and Third-Party Defendants must supplement their production of CDs with all
13 subsequently “mixed” and/or “finished” versions of the material at issue in Request No. 9. They may not
14 wait until the recordings are officially “released” to the public before producing them to Defendants. //

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III. CONCLUSION

For the reasons set forth in this Order, Defendants' Motion to Compel Production of Documents is hereby GRANTED as follows:

(1) Copies of Third-Party Defendant Jon Phelps's "black books" must be produced in full for the period from January 1, 2003 through September 20, 2004 within ten (10) days of the date of this Order. Copies of all pages, even if blank, shall be produced as a complete set. The set of pages produced shall be designated "Confidential." No redactions by Plaintiff and Third-Party Defendants are permissible, unless they are of financial account numbers, social security numbers, the names of minors, or birth dates.

(2) Plaintiff and Third-Party Defendants shall produce copies of all masters, mixes, rough mixes, and works in progress for all songs for the Brian Judah album produced without David Kershenbaum within ten (10) days of the date of this Order. The copies shall be designated “Confidential.”

SO ORDERED this 6th day of December, 2005.

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United States District Judge